Supreme Court, U.S.
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NO. _____

in the

Supreme Court of the United States

October Term, 1994

DARREN SCOTT CROSS,
Petitioner,

v.

JOHN JABE,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER, WHERE THE TRIAL COURT, DURING THE JURY CHARGE, BARS ANYONE FROM ENTERING OR LEAVING THE COURTROOM, STATING DISTRACTION OF THE JURY AS THE REASON; WHERE THE TRIAL COURT DOES NOT ASK COUNSEL TO SPEAK ON THE ORDER'S SUBJECT; WHERE DEFENSE COUNSEL DOES NOT OBJECT; WHETHER THE CLOSURE ORDER VIOLATES PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A PUBLIC TRIAL?

Petitioner responds "Yes."

Respondent responds "No."

The Courts Below respond "No."

LIST OF PARTIES

The only parties to the proceedings in the United States Court of Appeals for the Sixth Circuit were Petitioner Darren Scott Cross and Respondent John Jabe.

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THE LOWER COURTS ERRED IN DENYING PETITIONER'S APPLICATION FOR HABEAS CORPUS, BECAUSE THE TRIAL COURT DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A PUBLIC TRIAL. THIS COURT SHOULD GRANT A WRIT OF CERTIORARI TO APPLY AND INTERPRET ITS WALLER V. GEORGIA DECISION ON THE ABOVE RIGHT AND TO REMOVE SOME UNCERTAINTY ON ITS APPLICATION TO COURTROOM CLOSURES DURING THE JURY CHARGE.

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DECISION BELOW

On December 8, 1994, the United States Court of Appeals for the Sixth Circuit affirmed the decision of the United States District Court for the Eastern District of Michigan in an unpublished Order, docket number 94-1075.

STATEMENT OF JURISDICTION

Based on the above United States Court of Appeals decision, this Court has jurisdiction over this appeal under 28 U.S.C. Sec. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1) The United States Constitution, Sixth Amendment, reading in relevant part as follows: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." (Our emphasis).

2) The United States Constitution, Fourteenth Amendment, reading in relevant part as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Our emphasis).

STATEMENT OF THE CASE

Procedural History

1. On February 24, 1987, a Detroit Recorder's Court jury, before the Honorable Vera Massey Jones, convicted

Petitioner Darren Scott Cross (Petitioner Cross) of felony murder. (Trial Transcript [Trial Tr.], Vol. VII, p. 153)

2. On March 11, 1987, Judge Jones sentenced Petitioner Cross to life imprisonment in solitary confinement at hard labor. Judge Jones credited him with 184 days served in the Wayne County Jail. (Sentencing Transcript, p. 6)

3. On May 17, 1989, the Michigan Court of Appeals affirmed his conviction. (R. 25: Order)

4. On August 8, 1989, the Michigan Court of Appeals denied his motion for rehearing. (R. 25: Order)

5. On February 26, 1990, the Michigan Supreme Court denied his application for leave to appeal. (R. 25: Order)

6. On March 22, 1991, the Detroit Recorders Court, Judge Jones, denied his motion to set the judgment aside. (R. 22: Order)

7. On July 8, 1991, the Michigan Court of Appeals denied his application for leave to appeal the denial of his above motion "for lack of merit in the grounds presented. Judge Kelly would remand to the trial court to comply with MCR 6.508(E)." (R. 22: Order)

8. On or about January 31, 1992 the Michigan Supreme Court denied his application for leave to appeal the above Michigan Court of Appeals decision "because we are not persuaded that the questions presented should be reviewed by this Court." (R. 23: Order)

9. On or about December 22, 1992, Petitioner Cross petitioned the United States District Court for the Eastern District of Michigan under 28 U.S.C. Sec. 2254 for a writ of habeas corpus. (R. 1: Petition for Writ of Habeas Corpus)

10. On January 13, 1994, the District Court, the Honorable Barbara K. Hackett,

denied the petition. (R. 30: Memorandum Opinion and Order; R. 31: Judgment)

11. On January 24, 1994, Petitioner Cross appealed the District Court's decision to the United States Court of Appeals for the Sixth Circuit (R. 32: Notice of Appeal).

12. On February 3, 1994, the District Court, the Honorable Barbara K. Hackett, certified probable cause. (R. 35: Order)

13. On December 8, 1994, the United States Court of Appeals for the Sixth Circuit affirmed the District Court's decision without opinion. (Appendix A)

Substantive Facts

After presentation of all the evidence and completion of closing arguments, Judge Jones ordered from the bench as follows:

> "To the persons who are in the audience, once I start instructing this jury no

> one will be permitted to go out of this courtroom nor, to the officer who is at the door, is anyone to be admitted. People moving around will be too distracting and will not permit me to give the instructions as I should. So, if there are any persons who are in the audience who feel that they will not be able to sit inside the courtroom for the next 30 to 40 minutes it is now your opportunity to leave."

(Trial Tr., Vol. VI, p. 81 [Sixth Circuit Joint Appendix, p. 509])

Neither party objected to this order. The trial court did not ask counsel to speak before closing the courtroom. The trial court did not hold any hearing or consider any less drastic alternatives on the record. (Trial Tr., Vol. VI, p. 81 [Sixth Circuit Joint Appendix, p. 509])

REASONS FOR GRANTING THE WRIT

THE LOWER COURTS ERRED IN DENYING PETITIONER'S APPLICATION FOR HABEAS CORPUS, BECAUSE THE TRIAL COURT DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A PUBLIC TRIAL. THIS COURT SHOULD GRANT A WRIT OF CERTIORARI TO APPLY AND INTERPRET ITS WALLER V. GEORGIA DECISION ON THE ABOVE RIGHT AND TO REMOVE SOME UNCERTAINTY ON ITS APPLICATION TO COURTROOM CLOSURES DURING THE JURY CHARGE.

A criminal defendant has a constitutional right to a public trial. U.S.Const.Am.VI.

This right applies to the states under the Fourteenth Amendment's Due Process Clause. Duncan v. Louisiana, 391 U.S. 145, 148; 88 S.Ct. 1444; 20 L.Ed.2d 491 (1968)

The seminal case on the Sixth Amendment right to a public trial is Waller v. Georgia, 467 U.S. 39; 104 S.Ct. 2210; 81 L.Ed. 2d 31 (1984). There, the Court described the reasons why this right

is crucial for a fair trial:

> "The central aim of a criminal proceeding must be to try the accused fairly, and '[o]ur cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant.'"

Id. at 46, quoting Gannett Co. v. DePasquale, 443 U.S. 368, 380; 99 S.Ct. 2898; 61 L.Ed.2d 608 (1979).

> "'"The requirement of a public trial is for the benefit of the accused; that the public may see that he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions...."'"

Waller, 467 U.S. 39, 46, quoting Gannett, 443 U.S. 368, 380, quoting In Re Oliver, 333 U.S. 257, 270, n.25, 68 S.Ct. 499, 92 L.Ed. 682 (1948) (further citation omitted). Accord, Estes v. Texas, 381 U.S. 582, 588, 85 S.Ct. 1628, 14 L.Ed.2d 543

(1965)(Harlan, J., concurring).

> "'The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.'"

Waller, 467 U.S. 39, 46 n.4, quoting Oliver, 333 U.S. 257, 270.

Although the defendant's right to a public trial is not absolute and may have to yield "to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information, [s]uch circumstances will be rare...." Waller, 467 U.S. 39, 45.

Recognizing a strong "'presumption of openness,'" the Waller Court rejected any per se rule, permitting trial courts, absent proper discretion, to close the courtroom. Instead, the Waller Court adopted a stringent test for overcoming this strong presumption against such

closures:

1. The trial court must find that closure is essential to preserve higher interests or values.

2. The trial court must narrowly tailor the closure to serve those interests or values.

3. The trial court must express these interests or values on the record.

4. The trial court must make findings to support a closure order, and the findings must be specific enough to permit meaningful appellate review.

Id. at 45, citing Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 510; 104 S.Ct. 819; 78 L.Ed.2d 629 (1984).

Some circuits have developed a slightly less stringent formulation of the Waller Court's overriding interest requirement for partial closures, as opposed to total closures, of pretrial or

trial proceedings. E.g., Nieto v. Sullivan, 879 F.2d 743, 753 (10th Cir. 1989) (adopting "substantial reason" standard for a partial closure), United States v. Sherlock, 962 F.2d 1349, 1357 (1992)(same), Douglas v. Wainwright (Douglas I), 714 F.2d 1532, 1542 (11th Cir. 1983), vacated and remanded on other grounds 468 U.S. 1206, 104 S.Ct. 3475, 82 L.Ed.2d 874 (1984), affirmed 739 F.2d 531 (11th Cir. 1984)(Douglas II)(same).

Federal courts have consistently held that a criminal defendant need not show any specific prejudice to obtain relief from a trial court order violating his/her right to a public trial. E.g., Waller, 467 U.S. 39, 49, Douglas I, 714 F.2d 1532, 1542, Vidal v. Williams, 31 F.3d 67, 69 (2d Cir. 1994).

The reasons include the following: A requirement to show prejudice "'would in most cases deprive [the defendant] of the

[public-trial] guarantee, for it would be difficult to envisage a case in which he would have evidence available of specific injury.'" Waller, 467 U.S. 39, 49 n.9, quoting United States ex rel. Bennett v. Rundle, 419 F.2d 599, 608 (1969)(en banc).

This Court has rejected harmless error analysis for public trial violations. Waller, 467 U.S. 39, 49 n.9, quoting with approval People v. Jones, 47 N.Y.2d 409, 416, 391 N.E.2d 1335 (1979) ("'The harmless error rule is no way to gauge the great, though intangible societal loss that flows from closing courthouse doors.'").

Over a hundred years ago, the Michigan Supreme Court recognized the inherent prejudice in a violation of a defendant's right to a public trial and the inherent injury to our society:

> "'I cannot accede to the correctness of the proposition intimated in that case that, if a public

> trial has not been accorded to the accused, the burden is upon him to show that actual injury has been suffered by a deprivation of his constitutional right. On the contrary when he shows that his constitutional right has been violated, the law conclusively presumes that he has suffered an actual injury. I go further, and say that the whole body politic suffers an actual injury when a constitutional safeguard erected to protect the rights of citizens has been violated in the person of the humblest or meanest citizen of the State. The Constitution does not stop to inquire of what the person has been accused or what crime he has perpetrated; but it accords to all, without question, a fair, impartial, and public trial.'"

People v. Medcoff, 344 Mich. 108, 118, 73 N.W.2d 537 (1955), quoting with approval People v. Murray, 89 Mich. 276, 290, 50 N.W. 995 (1891) (Our emphasis).

The federal courts' rejection of any specific prejudice requirement or harmless error analysis results from the courts'

recognition that any prejudice from closures failing to meet the Waller requirements is inherent. Any such prejudice is impermissible. Harmless error is nonexistent. Therefore, Defendant need not object to a closure failing to meet the Waller requirements to preserve the issue for appellate review. Respondent's probable contrary position overlooks that the prejudice is inherent and the evidence needed to sustain an objection in the public trial context is almost impossible to obtain. Since the prejudice is inherent, a contemporaneous objection precondition for appellate review is insupportable and unworkable.

Despite the Waller Court's rejection of a per se rule on courtroom closures, the Second Circuit has apparently adopted such a rule on courtroom closures during the jury charge. In United States v. Romano, 684 F.2d 1057 (2d Cir. 1982),

cert. denied 459 U.S. 1016; 103 S.Ct. 375, 376, 74 L.Ed.2d 509 (1982), the trial judge closed the courtroom during the jury charge. The judge permitted only individuals already present to remain. After the trial court convicted the defendant, he appealed and claimed a violation of his right to public trial. The Second Circuit upheld the trial judge's order, characterizing it as a "reasonable limitation to ensure that the jury was properly instructed without distraction." Id. at 1065. The court noted that some members of the public were present during the charge and that no one else had tried to enter. Id. at 1065-1066.

The Romano Court's decision and reasoning are flawed. First, the decision predates Waller. Second, the Romano Court did not analyze any factors from pre-Waller decisions to determine if the trial court's order was constitutional,

necessary, or over-restrictive. Third, the Romano Court did not describe how any evidence of anyone trying to enter the courtroom would reach the court record. If court officers bar anyone from entering, how does such an individual express his/her wish to enter to the trial court? Thus, this Court should not follow Romano.

Building on Romano, the Second Circuit opened the possibility that trial courts can evade the Waller requirements and restore per se rules. The means of evasion is to find no closing of the courtroom. In Heering v. Meachum, 11 F.3d 374 (2d Cir. 1993), cert. denied ___ U.S. ___, 114 S.Ct. 1629; 128 L.Ed.2d 353 (1994), the trial judge closed the courtroom during the jury charge. Only those individuals already present could remain. The state trial court convicted the defendant, and the state supreme court denied leave to appeal. Appellant Heering

petitioned the district court for habeas relief based on denial of his right to a public trial, but the court denied the writ.

The Second Circuit affirmed. It distinguished Waller as a case involving total closure (there, the trial court closed a suppression hearing to all persons, except parties, counsel, witnesses, and court officers and officials). The Heering Court reasoned that unlike Waller, individuals had access to the whole trial, including the jury charge, "as long as they arrived before it began." Id. at 380. For individuals arriving late, the trial court made transcripts available. Thus, the Heering Court found no closure implicating Appellant's Sixth Amendment right. Id. The court then found the trial judge's order to be a reasonable manner restriction on courtroom access to prevent jury

distraction during the charge. Id.

This Court should reject Heering for several reasons. First, the Heering Court's no closure conclusion is erroneous, and its implications undercut Waller and the Sixth Amendment right to a public trial. Under Heering, the trial court has broad discretion to evade the Waller test or its slightly less stringent alternative. The trial court need only post an officer or a sign at the door commanding entering individuals to be quiet. The trial court should instruct all spectators to be quiet during the jury charge. The trial court should not have unfettered discretion to enforce sweeping time, place, and manner restrictions constituting the functional equivalent of closure, unless the court complies with Waller. The trial court should not have unfettered discretion to close parts of hearings and trials, including the jury

charge. Instead, the trial court must apply the Waller test. See People v. Micalizzi, 223 Mich. 580, 582, 585; 194 N.W. 540 (1923) ("The defendant by the Constitution ... was guaranteed a trial to which the public was admitted, not part of the public and part of the time,.... If a portion of the trial may be conducted behind barred doors, it may all be conducted behind barred doors. [Our emphasis]). Heering's overbroad discretion to find no closure permits the evasion of Waller's preconditions for restriction of access and resurrection of per se rules. Therefore, this Court should not follow Heering.

Other reasons support this conclusion. As discussed above, excluded individuals did not have any known means of communicating their exclusions on the court record. If an individual sees a "Do Not Enter--Jury Charge in Progress" or

similar sign, that individual will leave. Second, the Heering Court's assumption that providing transcripts adequately substituted for permitting actual attendance ignores Waller's, Gannett's, and Oliver's dicta that individuals' actual presence, not review of transcripts or even newspapers, helps keep trial judges, prosecutors, defense counsel, and others on good behavior and within bounds. Third, the trial judge did not explore other alternatives to closure. Thus, the Court should reject Heering.

During the jury charge, other means to control potential problems besides closure are available. For example, noise from footsteps of individuals entering or leaving the courtroom, spectators' talking and whispering, noise from cooling and heating units may distract the jury. Court officers' requests and warnings can control the first two. Timely repairs can

control the third. Closing the courtroom in response to these potential problems is thus drastic and unnecessary.

Review of recent Michigan appellate decisions on the right to a public trial reveals a glaring contradiction and one decision contrary in part to Waller. In Micalizzi, 223 Mich. 580; 194 N.W. 540 (1923), the Michigan Supreme Court found a right of public trial violation based on closing the courtroom during the jury charge. There, the trial court locked the courtroom during the jury charge, thus excluding one defense attorney and some other individuals. The trial court convicted the defendant of first degree murder and denied his motion for new trial. The Michigan Supreme Court reversed and held that the trial court had violated his right to a public trial. The court reasoned that the record did not show any good reason, like an overcrowded

courtroom, to justify closure. The Micalizzi Court quoted the above Murray passage with approval. Id. at 583-584.

In People v. Bails, 163 Mich. App. 209; 413 N.W.2d 709 (1987), lv. denied 429 Mich. 890 (1987), the Michigan Court of Appeals did not find a violation on facts similar to Micalizzi. In Bails, the trial court locked the courtroom during the jury charge. The stated reason was increased traffic on a sentencing day would distract the jury. The court did not exclude any onlookers already present. Defendant did not object. The trial court convicted the defendant of first degree criminal sexual conduct and denied his motion for new trial.

The Michigan Court of Appeals affirmed. It cited lack of defense objection, the short closure period, and the above stated reason. The Bails Court then distinguished Micalizzi, by stating

that unlike Micalizzi, the trial court did not bar a defense attorney or any other known persons. In dicta, the Bails Court called the defense objection "a pivotal point" in the Waller decision. Id. at 211. In further dicta, the Bails Court stated that it "would not hesitate to apply the harmless error analysis in this situation." Id. at 212.

This Court should reject Bails. On the closure time period, the Micalizzi Court is correct in evaluating its significance: The fact of closure, not its length, is crucial. The Micalizzi Court evaluated the stated reason for closure. The Bails Court failed to do so. It also failed to evaluate less drastic alternatives, thereby ignoring Waller. The Bails Court's distinguishing of Micalizzi overlooks Waller's and other federal courts' rejection of any requirement to show specific prejudice from a closure. If

a defendant need not show prejudice, he need not identify excluded individuals. The Bails Court's reading of Waller on defense objections is incorrect. The Waller Court did not mandate contemporaneous objection and did not base its decision on trial counsel's objection. Finally, the Bails Court's dicta on harmless error contradicts the Waller Court's rejection of harmless error analysis on the right of public trial violations. For these reasons, this Court should reject Bails.

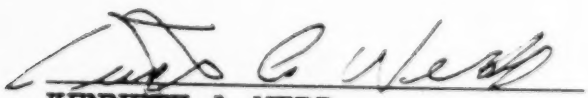
Based on the above review, this Court has good reason to hear this appeal. It involves important issues on the Sixth Amendment right of public trial. State trial courts' closure of the courtroom during the jury charge may well be prevailing practice. This practice does evade Waller's mandate, unless the trial court applies Waller's factors. This

appeal permits the Court to examine the parameters of Waller in a jury charge context.

CONCLUSION

WHEREFORE, Petitioner Darren Scott Cross respectfully requests this Court to issue a Writ of Certiorari and hear his appeal.

Respectfully submitted,



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